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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK A. DOZIER,

Defendant and Appellant.

A137643

(San Francisco County
Super. Ct. No. 217993)

Defendant Frederick A. Dozier appeals from a judgment sentencing him after jury trial to 373 years to life for committing multiple sexual offenses against three women in three different incidents in the Mission District of San Francisco in 2011. Defendant alleges numerous grounds for why certain aspects of the judgment should be reversed. We modify the judgment to stay defendant's sentence for count nine, one of his assaults of B.S., and strike the restitution he was ordered to pay for this count. We otherwise affirm the judgment.

BACKGROUND

In May 2012, the San Francisco County District Attorney filed an information against defendant charging him with 27 counts of criminal offenses against three women, identified as B.S., L.W. and S.D. Defendant was alleged to have grabbed each woman as she walked alone on a San Francisco sidewalk in an early morning in 2011, forced her to travel on foot a distance, hit and sexually attacked her, and stolen things from her.

Defendant moved pursuant to section 995 to dismiss certain charges reinstated by the prosecution after a magistrate had discharged them. The court denied defendant's motion except it dismissed count 25. Defendant pled not guilty to all charges.

In a subsequently filed second amended information, defendant was charged in counts one through 13 with attacking B.S. on June 17, 2011, as follows: count one, kidnapping to commit rape, sodomy, oral copulation and sexual penetration (Pen. Code, § 209, subd. (b)(1))¹; count two, assault with the intent to commit rape, sodomy, oral copulation and sexual penetration (§ 220, subd. (a)(1)); counts three, four, seven and 11, forcible oral copulation (§ 288a, subd. (c)(2)(A)) with special allegations; count five, attempted rape by force or violence or threat of great bodily injury (§§ 664, 261, subd. (a)(2)); counts six, eight and 12, sexual penetration by foreign object, force and violence (§ 289, subd. (a)(1)(A)) with special allegations; count nine, assault in that defendant “slapped” B.S.’s face with the intent to commit rape, sodomy and oral copulation (§ 220, subd. (a)(1)); count 10, attempted rape by force or violence or by threat of bodily injury (§§ 664 and 261, subd. (a)(2)); and count 13, second degree robbery (§ 211) with a special allegation.

Defendant was charged in counts 14 through 23 with attacking L.W. on November 18, 2011, as follows: count 14, kidnapping to commit rape, sodomy, oral copulation and sexual penetration (§ 209, subd. (b)(1)); count 15, assault, in that he “punched and slapped” L.W. in the face with the intent to commit rape, sodomy, oral copulation and sexual penetration (§ 220, subd. (a)(1)); counts 16 and 19, forcible oral copulation (§ 288a, subd. (c)(2)(A)) with special allegations; counts 17, 18, 20 and 21, sexual penetration by foreign object, force and violence, having digitally penetrated each of L.W.’s vagina and anus two times (§ 289, subd. (a)(1)(A)), with special allegations; count 22, attempted murder (§§ 664 and 187, subd. (a)); and count 23, second degree robbery (§ 211).

Defendant was charged in counts 24 through 26 with attacking S.D. on December 8, 2011, as follows: count 24, kidnapping to commit rape, sodomy, oral copulation and sexual penetration (§ 209, subd. (b)(1)) with a special allegation; count 25, assault with the intent to commit rape, sodomy, oral copulation and sexual

¹ All further statutory references herein are to the Penal Code.

penetration (§ 220, subd. (a)(1)) with a special allegation; and count 26, second degree robbery (§ 211) with a special allegation.

A trial commenced in October 2012, at which the People presented the testimony of numerous witnesses, including B.S., L.W. and S.D. Defendant presented only the testimony of his long-time girlfriend, who spoke principally about his good character.

I.

The Evidence of Defendant's Attack on B.S.

A. B.S.'s Testimony

B.S. testified that on June 17, 2011, she was walking home northbound on South Van Ness Avenue at about 3:10 or 3:15 a.m. No one else was walking in the area except for a hooded individual on the other side of the street. He crossed over to B.S.'s side of the street ahead of her and disappeared.

B.S. kept walking, but moved closer to the curb. There was some streetlight illumination, but it "was really dark." As she approached 24th Street, she saw the individual hiding in a driveway to her right. He grabbed her from behind, pushed her down onto the ground, put his hand over her mouth, told her not to scream and said she was not going "until he had his way" with her. He lifted her from the ground, stood behind her, and cupped her breasts. She pleaded with him to let her go and he told her to shut up.

The man forced B.S. to walk on South Van Ness Avenue back towards 25th Street. He became frustrated with B.S.'s pleadings. About three houses from where he first grabbed her, he said, " 'Fuck it. We're just going to do this here.' " He took her into a driveway where a car was parked. The driveway area was darker; there was no light on there or emanating from any nearby houses.

The man ordered B.S. to lie down on her back in an area about three or four feet wide between the car and a driveway wall, about a foot from a house door. He positioned himself so she could not get away from him. At his demand, B.S. began taking off her pants and underwear; impatient, he forcefully pulled them down to her knees. He took off his pants and underwear, exposing his penis. He tried to spread her legs apart, but

could not because of her jeans. He took off her right shoe and right pants leg, got on top of her and tried to penetrate her vaginally with his penis. He pressed his penis, which was “a little bit soft,” against her vagina and tried to penetrate her four or five times in a row, but could not because she was “really tense.”

The man became frustrated. He placed his tongue on B.S.’s vagina for about 30 seconds, then forced her to sit up and put her mouth on his penis for about another 30 seconds, telling her to “suck it.” He placed one or two fingers in her vagina for about a minute. When she would not quiet down, he put his hands around her neck and pushed down hard. She had difficulty breathing and could not speak. After about 15 seconds, he let go, again forced her mouth to his penis and pushed her head back and forth, putting his penis into her mouth for a minute or more. When she gagged, he slapped her “pretty hard” on her left cheek.

The man then told B.S. to turn around. When she got on her hands and knees, he put a finger into her anus, which hurt her a lot. She told him it was painful, which angered him. He ordered her to turn around and lie on her back, and again tried to penetrate her vaginally with his penis, this time for about a minute. She felt his penis against her vagina, but he again was not able to penetrate her because she was too tense.

The man told B.S., “ ‘I’m not going to let you go until I come.’ ” Terrified, she told him she would comply with oral sex. He grabbed her head and put his penis in her mouth for about three to five minutes, putting his fingers into her vagina during about half of this time. He then masturbated until he ejaculated, including into a scarf she was wearing.

The man told B.S. to put on her clothes. He was almost completely naked and she saw his face. He demanded her money and her red sweater, which she gave to him, made her promise not to tell the police and fled towards 25th Street.

B.S. called a friend, who met her nearby and flagged down a police car. They drove around the area looking for the suspect and recovered her red sweater near the crime scene. B.S. left her scarf behind when she got into the police car, but they returned about 15 minutes later and retrieved it.

At trial, B.S. identified defendant as her attacker. She also said that in January 2012 she initialed one of thirty photographs the police showed her as resembling her attacker. The photograph was of defendant.

B. Other Evidence Regarding the Attack on B.S.

A forensic nurse practitioner at San Francisco General Hospital examined B.S. shortly after the attack. She found B.S. had “little microscopic hemorrhages on the roof of her mouth” that were caused by “some sort of blunt force trauma” consistent with her account and “a superficial abrasion” in the lower part of her genital area, outside of her vaginal area.

Police later measured the distance between the curb where B.S. said the man first grabbed her and the driveway where B.S. said he sexually attacked her. The sidewalk distance was 95 feet, and the distance into the driveway was about an additional 10 feet.

Cuttings from B.S.’s recovered scarf contained sperm. A DNA analysis was performed of the cuttings and defendant’s reference sample. An expert in DNA analysis testified that they contained the same profile in all of the 13 markers examined. Statistically, the probability of a random, unrelated individual by chance having this same DNA profile was one in four quintillion in the relevant statistical group.

II.

The Evidence of Defendant’s Attack on L.W.

A. L.W.’s Testimony

L.W. testified that she was walking down 24th Street in the early morning hours of November 18, 2011, to a bus stop on Potrero Avenue; she was on her way to work and carrying a backpack. About a block past Mission Street, she saw a hooded person walking in the same direction on the other side of the street.

When L.W. arrived at the bus stop’s shelter, no one else was there. It was still dark outside, but a streetlight a half a block away provided some illumination, as did the flashing bus schedule at the bus shelter. L.W. saw the hooded person at a nearby intersection, but did not pay close attention to him. As L.W. stood by the bus schedule, her back to the outside of the bus shelter, someone put an arm around her neck very

forcefully, choking her. She became weak and had difficulty breathing. A man ordered her to walk forward. She tried to escape his hold, but he tightened his grip. When she refused to walk forward, he hit her repeatedly in her face and dragged her along. His tight arm around her throat prevented her from calling for help.

The man dragged L.W. about a half a block towards 25th Street to beneath a tree, near a car that blocked any views of their location from the street. It was very dark there, much darker than by the bus stop. He pushed her to the ground and asked her if she had any money. She had none. He hit her “[m]any, many times” in her face, with both a fist and an open hand, despite her pleas that he stop. He had his hood on, but she could see his face.

The man moved in front of L.W. with his penis exposed and said, “ ‘Suck me.’ ” She refused and moved her head away. He choked her until she could not breathe; she nodded her head and he released his hold. He pushed her head towards his penis and she licked it for what seemed like a “really, really, really long time” as he yanked her hair and held onto her shoulder. She tried to vomit and he hit her some more.

As L.W. retched, her head down, the man went behind her and tore off her pants, underwear and shoes. He put two fingers “really deep” in her anus and twisted them for a “really, really long time,” which caused L.W. a lot of pain. He put two fingers into her vagina and twisted them, causing her even more pain. He hit her “all over” while she pleaded with him to stop.

Again, the man told L.W., “ ‘Suck me.’ ” Again, she licked him, again she wanted to vomit. He hit her when she stopped. He told her not to look at his face, choked her by the throat and twisted her neck.

After L.W. licked the man’s penis, the man put his fingers into her vagina again, causing her excruciating pain. The man put his fingers in L.W.’s anus again, more painfully than the first time.

When L.W. tried to look at the man again, he told her not to and choked her very, very hard. She could not breathe or make a sound. She was on the verge of losing consciousness and felt her eyeballs were about to pop out. She pretended she was dead

by holding her breath and not moving. The man seemed to think she was dead. He punched her really hard and threw something hard, possibly her lunch box, at her head.

After some time, the man left, came back, took her backpack and other items, including her driver's license, identification card, and credit cards, and left again. L.W. got up after she was sure he had left and was soon taken to the hospital.

At trial, L.W. identified defendant as her attacker. She acknowledged he was the only African-American man in the courtroom, but was sure he had attacked her. She identified the location of the attack from certain exhibits, including the area in front of the tree and the car that was parked there. She said she still had difficulty speaking because of the assault.

B. Other Evidence Regarding the Attack on L.W.

San Francisco police arrived at the scene of the man's attack on L.W. at about 4:00 a.m. Police found items of clothing and other things belonging to L.W. in the area. The distance from the bus shelter to the tree where she said she was attacked was approximately 146 feet.

L.W. was taken to San Francisco General Hospital and examined by a forensic medical examiner that morning. She had "extensive medical injuries," including a two-by-three-inch abrasion on her left knee, areas of bruising, redness and tenderness on her right clavicle, multiple abrasions on her elbows, bruising and swelling on her lip and chin, and bruises and swelling throughout her face consistent with blunt force trauma. She also had a more than two-inch laceration on her labia and three lacerations on both her posterior forchette and perianal area, which were consistent with forcible assaults. She had swelling and bruising around her eyes and hemorrhages in the whites of them, which are common when strangulation involving "fairly significant force" is involved. The examiner, who had specialized in sexual assaults for seven years, testified that L.W. was "the most severe strangulation patient" she had seen.

Peri-oral swabs from L.W.'s examination tested positive for amylase (a component of saliva) and nucleated cells, but not for sperm. A DNA analysis was done of this sample. A major profile was consistent with that of L.W. A minor profile was

developed based on 10 of 13 alleles tested and compared to the DNA retrieved from B.S.'s scarf and defendant's reference sample. The profile was consistent with defendant's sample. The possibility that a random, unrelated individual by chance would possess the same DNA profile as that of the minor contributor here was one in four billion for the relevant statistical group.

III.

The Evidence of Defendant's Attack on S.D.

A. S.D.'s Testimony

S.D. testified that about 6:20 a.m. on December 8, 2011, she was walking down 24th Street towards Mission Street on her way to a gym class. According to S.D., "[i]t was completely still full nighttime dark out." She carried a gym bag containing clothes and personal items, and a work bag containing a laptop computer, some work papers, a wallet and a phone. Around 24th and Dolores Street, she heard footsteps behind her, glanced in that direction and saw a man wearing a hoodie behind her. She stopped at 24th and Dolores for a red light. The man walked past her and crossed Dolores. S.D. waited for him to get some distance ahead of her and crossed when the light turned green. She saw only one other person on foot in the area.

S.D. continued down 24th Street. As she walked, she saw the man turn right on Fair Oaks Street about a half a block ahead of her. When she got to the corner, she looked down Fair Oaks, expecting to see him walking away, but did not see anyone. There were some street lights and that part of the block seemed darker than other blocks further up 24th. At the curb line, she heard a low voice and a shout. Scared, she turned to run down 24th Street because it was a busier street. A man grabbed her from behind. S.D. tried to get away, but he was too strong. He pushed her north, across 24th and down Fair Oaks. She tried to push back, afraid to go down Fair Oaks. She screamed for help, told him to take her things and asked him not to hurt her.

The two crossed 24th and headed down Fair Oaks, which seemed darker. There were a lot of trees that blocked the light, and it was a smaller side street. She did not see

any foot or car traffic. She tried to scream louder, but the man held her tighter, choked her, told her not to scream and said he was not going to hurt her.

S.D. stopped breathing and passed out. She awoke to find herself face down on the ground, her head facing the street. Blood was running out of her nose and the man was behind her. She felt something hard between her legs, next or close to her vagina. It was harder than someone's hand, larger than fingers and seemed to be a body part. Her short pants had been pulled down and she wore nothing underneath them. At some point, the man pushed S.D. over on her side, punched her "pretty hard" on the side of her face and shoved her head into the ground. He was wearing a black hoodie, but she saw his face a little bit because he squatted down next to her. He was African-American. He yelled at her not to scream. He said something she did not hear and ran away towards 24th Street, picking up her two bags nearby. S.D. got up and a man walking nearby called the police at her request.

At trial, S.D. estimated the man took approximately \$3,000 in property from her. She identified defendant as someone whose looks were "very consistent" with those of the man who attacked her.

B. Other Evidence Regarding the Attack on S.D.

A San Francisco police officer who arrived at the scene soon after the attack on S.D. noticed a trail of blood on the sidewalk from 24th Street to about half way down the block on Fair Oaks, where there was a pool of blood. He testified that 24th Street was "heavily used as a thoroughfare" with public transportation on the street, while Fair Oaks was "a residential street" with houses on both sides of the road. The foot and car traffic on Fair Oaks was "very, very light" compared to 24th Street. He noticed that it became darker as he walked down Fair Oaks from 24th Street because of trees on the sidewalk. It was "way darker" in the middle of the block on Fair Oaks than at the intersection of 24th and Fair Oaks.

A San Francisco police inspector testified that police measured the distance as approximately 146 feet from where, according to S.D., the man first grabbed her to where

he dragged her. The inspector also said it became darker as one traveled down Fair Oaks from 24th Street, including because of the tree crowns there.

S.D. was taken to San Francisco General Hospital on the morning of the attack and treated for facial injuries, including complex lacerations that required suturing. She was examined by a forensic medical examiner that afternoon. The examiner testified that S.D. complained of having been choked and had significant tenderness on her neck. She had a significant amount of blunt force trauma on her face that was consistent with her account. She did not have any vaginal injury, which was common in sexual assault cases.

IV.

Defendant's Arrest

The police arrested defendant in January 2012 after a DNA analysis compared defendant's reference sample with the samples taken from B.S.'s scarf and L.W.'s mouth, and B.S. identified a photograph of defendant as resembling her attacker. He lived less than a mile from the location of each of the assaults. The police conducted a video-recorded interview with him, which was played for the jury. Defendant admitted that he assaulted all three women, but described the assaults as less violent than described by the women.

V.

Verdict and Sentencing

The jury found defendant guilty of all counts and found all allegations to be true, except that it found him not guilty of the attempted murder of L.W. (count 22) and rejected the allegation that he personally inflicted great bodily injury on S.D. in robbing her (count 26).

The court sentenced defendant to a total term of 373 years to life. This consisted of a determinate term of five years for robbing L.W. (count 13); four consecutive one-year terms for the attempted rapes of B.S. and robberies of L.W. and S.D. (counts five, 10, 23 and 26); four consecutive six-year terms for assaults with the intent to commit rape, sodomy, oral copulation and sexual penetration (counts two, nine, 15 and 25); thirteen consecutive indeterminate sentences of 25 years to life for consummated sexual

offenses (counts three, four, six through eight, 11, 12 and 16 through 21); an indeterminate sentence of seven years to life for the kidnapping of S.D. to commit rape, sodomy, oral copulation and sexual penetration (count 24); and eight years for sentence enhancement allegations found to be true regarding crimes against S.D. (counts 24 and 25). The court stayed sentences for defendant's kidnapping convictions regarding B.S. and L.W. (counts one and 14). Among other things, it ordered defendant to pay a \$10,000 restitution fine for each of the 25 counts for which he was convicted, for a total of \$250,000.

Defendant filed a timely notice of appeal. During the pendency of this appeal, this court asked the parties to submit supplemental briefs regarding whether prejudice to defendant must be shown if we conclude the court erroneously denied his section 995 motion regarding counts 9 and 24. Both sides did so.

DISCUSSION

I.

Defendant's Assault Convictions

Defendant first argues that we should reverse or vacate his convictions for his four assault convictions because each is a lesser included offense in another conviction. We disagree.

A. Defendant's Assault Convictions Were Not Necessarily Lesser Included Offenses.

According to defendant, his convictions for assault with the intent to commit rape, sodomy, oral copulation and sexual penetration of B.S. (counts two and nine) and L.W. (count 15) must be reversed or vacated because each is a lesser included offense of one or the other of the consummated sexual offenses for which he was also convicted (counts three, four, six through eight, 11, 12 and 16 through 21). Also, he argues, his conviction for sexual assault of S.D. (count 25) must be vacated or reversed as a lesser included offense of his aggravated kidnapping of her (count 24), of which he was also convicted. The People disagree. They contend the jury could

have reasonably concluded defendant was guilty of these assault counts based on acts separate and divisible from those underlying these other convictions.

Pursuant to section 954, “a single act or course of conduct by a defendant can lead to convictions ‘of *any number* of the offenses charged.’ [Citations.] But a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses. [¶] In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether ‘ “ ‘all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.’ [Citation.]” ’ [Citation.] In other words, ‘if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.’ ” (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) “When a defendant is found guilty of both a greater and necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed.” (*People v. Sanders* (2012) 55 Cal.4th 731, 736.)

This rule does not apply, however, when the charges at-issue may be based on different acts. “If offenses are necessarily included, the question whether the acts are the same is a question for the jury, unless as a matter of law the acts are not divisible.” (*People v. Greer* (1947) 30 Cal.2d 589, 600 (*Greer*), overruled on other grounds in *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6.) “The divisibility of acts in cases involving sex offenses is not easily susceptible of exact definition.” (*Greer*, at p. 600.) Nonetheless, if the touching was a part of the sexual act itself, it cannot serve as a basis for a separate conviction; to allow it to do so would result in “a technical fragmentation of acts having no realistic basis in common experience.” (*Id.* at pp. 600–601.)

Defendant points out that the jury was instructed to find him guilty of assault against B.S. and L.W. (in counts two, nine and 15) if it found he specifically intended to commit rape, oral copulation, sodomy, and/or sexual penetration, acts for which he was found guilty in other counts. “The instruction given,” defendant argues, “did not distinguish the assault with intent to commit a sexual offense as an offense separate from

the sexual offenses themselves. . . . [¶] . . . The assaults were necessarily included in the sexual offenses.” He contends his assaults cannot be distinguished from his consummated sexual offenses since the latter were charged pursuant to Penal Code statutes that required they be “accomplished against the victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim.” (§§ 288a(c)(2)(A), 289(a)(1)(A).)

The People do not disagree that, as a matter of law, the elements of the assaults with which defendant was charged can be found within the elements of his other forcible sexual offenses against B.S. and L.W. They disagree that the assault convictions were improper, however. To the contrary, in their view a reasonable juror could conclude from their allegations and the evidence and argument presented at trial that defendant engaged in assaults that were divisible and separate from his other sexual offenses.

We conclude defendant does not establish the acts involved were indivisible as a matter of law, nor could he in light of the allegations, evidence and argument presented at trial. Therefore, “the question whether the acts are the same [was] a question for the jury.” (*Greer, supra*, 30 Cal.2d at p. 600.) Defendant employed force and violence in each of his sexual offenses. According to B.S., he forcibly pulled down her pants and attempted to rape her, forced her to sit up, forced her mouth on his penis and demanded that she “suck it,” forced his fingers into her vagina and anus, pushed down hard on her neck, impairing her breathing, forced her mouth on his penis again and pushed her head back and forth, ordered her to move about and grabbed her head. Therefore, it cannot be said that the People *needed* to rely on the force committed in the assaults alleged in counts two and nine to establish that he committed his sexual offenses by the use of force.

If the People had charged each of these acts as separate assaults—which they did not—those counts arguably might have constituted lesser included offenses of the “sexual offense by force” charges for which he could not have been separately convicted. However, the People based their assault counts regarding B.S. (counts two and nine) on acts other than those involved in the consummated sexual offenses themselves. B.S.

testified that defendant first grabbed her by the curb at 24th Street and South Van Ness Avenue and pushed her to the ground, then told her she was not going to “until he had his way” with her; after doing so he forced her to a darkened driveway where he began his other sexual offenses against other. Thus, it was a question of fact whether defendant was guilty of count two based on defendant’s initial assault of B.S., before he moved her to the driveway, separate from the force he employed in committing his other sexual offenses.

Similarly, regarding count nine, the People specifically alleged that defendant had committed an assault against B.S. when he “slapped [B.S.’s] face.” B.S. testified that after dragging her to the darkened driveway, defendant forced her mouth to his penis and pushed her head back and forth. At some point, B.S. gagged. This was when defendant slapped her hard on her left cheek. It is apparent from B.S.’s testimony that he did *not* do so to force her to continue this oral copulation. Rather, he then told her to turn around, whereupon he continued with other sexual offenses. Therefore, it was a question of fact whether defendant was guilty of count nine based on this slap, a separate act.

The People alleged in count 15 that defendant sexually assaulted L.W. when he “punched and slapped victim’s face.” L.W. testified that defendant, after he dragged her away from the bus shelter to another area down the block, asked her for money and, when she had none, hit her many times in the face with both a fist and an open hand. He then moved in front of her with his penis exposed and demanded that she orally copulate him. When she refused, he choked her until she complied, then engaged in other acts of forcible digital penetration and forcible oral copulation. The prosecutor referred to this flow of events in closing argument when he said that, after defendant moved L.W., he “struck her, the sexual assault,” and *then* proceeded to engage in various sexual offenses. Thus, it was a question of fact for the jury whether defendant was guilty of count 15 based upon the factual finding that he struck L.W. independent of the force he used in any of the subsequent consummated sexual offenses for which he was convicted.

Regarding S.D., defendant argues his assault conviction (count 25) was based on a necessarily lesser included offense in his kidnapping of S.D. for the purposes of

committing a sexual offense (count 24). We disagree because a reasonable juror could have concluded that the factual basis for this offense was separate from the kidnapping. S.D. testified that *after* defendant had moved her from 24th Street to the darker Fair Oaks (which movement was the basis for the People’s kidnapping charge), S.D. woke up to find her face bloodied, her pants pulled down, defendant behind her and something hard touching against the inside of her upper leg; it reasonably could be inferred from her testimony that defendant pressed his penis against her leg. The prosecution argued this offensive touching was the factual basis for the assault charge against defendant, and a reasonable jury could so find. Once more, defendant does not show indivisible acts as matter of law. Therefore, it was a question of fact for the jury whether defendant’s assault was based on a separate act from his kidnapping of S.D., even if both offenses were directed towards the same result—the consummation of a forcible sexual act against S.D.

B. Defendant’s Assaults of B.S. Reasonably Could Be Found to Be Independent of His Aggravated Kidnapping of Her.

In a related argument, defendant contends that he also should not have been convicted of the assaults against B.S. because they “must be . . . merged with the act constituting the kidnapping with the intent to commit a sexual offense.” This too is unpersuasive.

Defendant does not explain his position further. Therefore, he has not met his burden of establishing prejudicial error. (See., e.g., *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 846 (*Lynch*) [it is elementary that “[e]rror . . . will not be presumed in favor of reversing a judgment”]; appellant has “the burden of establishing error prejudicial to him”].) In any event, a reasonable juror could conclude that he was guilty of assaulting B.S. with the intent to commit a sexual offense against her independent of his kidnapping of her. According to B.S., defendant first grabbed her from behind at the corner of 24th and South Van Ness, pushed her down onto the ground, put his hand over her mouth, told her not to scream and said she was not going “until he had his way” with her. A reasonable juror could conclude from these facts that defendant at first contemplated

committing sexual offenses against her then and there, which would be a sufficient basis for an assault charge independent of a subsequent decision to move her to the more secluded driveway, the basis for his kidnapping conviction. Similarly, his slap of B.S. occurred well after his movement of her, including after he committed other sexual offenses. A reasonable juror could determine that this assault was independent of the aggravated kidnapping based on these facts.

C. Defendant's Assaults of B.S. Reasonably Could Be Found to Be Independent of Each Other.

Defendant further argues that he should not have been charged with two assaults, rather than one, against B.S.. He contends that the assaults charged in counts two and nine were part of one continuing assault, rather than independent acts. We disagree.

As we have already discussed, B.S.'s testimony indicates that defendant first assaulted her by grabbing her, pushing her to the ground and putting his hand over her mouth, prior to moving her to the driveway. Her testimony further shows that after moving her, he committed a series of sexual offenses, and then assaulted her again by slapping her face when she gagged during forcible oral copulation. He then perpetrated a series of further sexual offenses on her. A reasonable juror could conclude from these facts that defendant had committed two distinct assaults.

Section 954 permits a prosecutor to "charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts." As long as there are multiple acts, each of which alone meets the elements of the offense, the defendant may be charged with multiple counts under the same provision of the Penal Code. Thus, in *People v. Johnson* (2007) 150 Cal.App.4th 1467, the defendant was convicted of three counts of corporal injury of a cohabitant, a woman, in violation of section 273.5. (*Id.* at p. 1471.) On appeal, he argued that he could not be convicted of three violations for what amounted to a single assault. (*Ibid.*) The court summarized the evidence as showing that "[defendant] punched her in the nose, eyes, and mouth. He choked her and held her by her throat against the wall. He struck her on her neck, her arm, her lower back, and her leg. He also stabbed her in the left arm." (*Id.* at p. 1472.) After reviewing the law

regarding section 954, the court concluded, “[d]efendant indisputably committed successive acts of violence against Doe. Although Doe’s testimony does not precisely describe the sequence of the beating, we do know that defendant beat her about the face and head; held her by her throat up against the wall; beat her on her back, hips, and legs; and stabbed her in the upper arm. . . . Accordingly, the evidence is sufficient to support the three convictions of section 273.5.” (*Id.* at p. 1477; see also *People v. Healy* (1993) 14 Cal.App.4th 1137 [holding acts of abuse against spouse or cohabitant occurring over time may be charged as separate offenses].) *Johnson* is analogous to this case. Indeed, the facts here are even more supportive of the judgment than those in *Johnson*, because here defendant’s two assaults on B.S. were separated in time and place and by other intervening offenses.

Defendant fails to present any legal authority that establishes a reasonable juror could not conclude his assaults were separate acts based on these facts. He cites to *People v. Lueth* (2012) 206 Cal.App.4th 189 (*Lueth*) and *People v. Thompson* (1984) 160 Cal.App.3d 220. Neither case is on point. *Lueth* involved a different issue—whether or not there was a continuous course of conduct establishing an exception to the requirement that where multiple acts could form the basis for a single charge a unanimity jury instruction must be given. The court suggested that there was evidence of two discrete beatings, but concluded that the failure to give a unanimity instruction was harmless. (*Lueth, supra*, at pp. 195–200.) *Thompson* (discussed in *Lueth, supra*, at pp. 197–198), likewise involved the question of whether a jury unanimity instruction was required rather than whether the evidence supported the prosecutor’s charge of multiple crimes. In short, defendant’s argument that his two assaults on B.S. amounted to only one for which a conviction could be obtained is without merit.

II.

Defendant’s Two Attempted Rape Convictions

Defendant further argues that, even if we do not reverse or vacate his assault conviction in counts two and nine, we should reverse his attempted rape convictions in

counts five and 10 (both regarding B.S.) because they are lesser included offenses of these assaults. Again, we disagree.

Defendant asserts that “[a]n attempted rape by force or fear can not [*sic*] happen without an accompanying assault with intent to commit rape” and cites three cases in support of his position. This may be true, but each of the cases he cites involves a single act or crime. (See *People v. Rupp* (1953) 41 Cal.2d 371, 382 [stating that “[t]he evidence in the record reasonably shows the commission of no crime other than a killing in an attempt to perpetrate a rape”]; *People v. Ramirez* (1969) 2 Cal.App.3d 345, 351 [“[h]aving been convicted of assault with intent to commit rape, defendant could not legally be punished for that crime and for attempted rape based upon the same facts”]; *People v. De Porceri* (2003) 106 Cal.App.4th 60, 68–69 [prior conviction for assault with the intent to commit a molestation necessarily included the lesser offense of an attempted molestation].) These cases are of no avail to defendant because, unlike those cases, here the evidence could lead a reasonable juror to convict defendant of assault and attempted rape based on *separate* and distinct acts.

That is, as we have discussed, substantial evidence indicated that defendant assaulted B.S. both before moving her to the driveway and afterward, when he later slapped her. Defendant first attempted to rape her after he ordered her to lie down in a driveway, forcibly removed her right shoe and right pant leg, got on top of her and tried unsuccessfully to penetrate her vaginally with his penis four or five times. His second attempted rape of her occurred after he had penetrated her anus with his finger, then ordered her to turn around and lie on her back, at which point he again tried unsuccessfully to penetrate her vaginally with his penis for about a minute. A reasonable juror could conclude that the assaults and attempted rapes of B.S. involved separate and distinct acts.

III.

Defendant’s Unanimous Jury Instruction Argument

Defendant next argues that the court should have instructed the jurors that they were required to agree unanimously on the acts that were the bases for any assault

convictions. This too is incorrect because the prosecutor elected to base his assault counts on specific acts.

Because the federal and state constitutions require that a jury verdict in a criminal case be unanimous, “the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation]. Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’ ” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

When the prosecution does elect to rely on a specific act, there is no risk of the jury basing a conviction on different acts. In this circumstance, the court has no duty to instruct the jury regarding this unanimity. The prosecution can make the election in closing argument. (See, e.g., *People v. Mayer* (2003) 108 Cal.App.4th 403, 418–419.)

Here, the prosecution made specific elections predicating each assault on particular acts. Regarding defendant’s two assaults of B.S. (counts two and nine), the prosecutor stated in closing argument, “There are two sexual assaults which are supported by how *she described the defendant first grabbing her, then striking her*, before he moved her. After he moved her . . . [h]e continued to strike her. *He slapped her, and he punched her*. Hence we have *two sexual assaults*.” (Italics added.)

Defendant argues the prosecutor’s statement did not constitute an election for counts two and nine because the prosecutor referred to “multiple acts which could constitute an assault, acts occurring before and after the victim was moved.” We disagree. The prosecution specifically referred to the assaults as “defendant *first* grabbing her, then striking her” before moving her to the driveway and “[a]fter he moved her,” “slap[ing]” and “punch[ing]” her. (Italics added.) The distinction between the acts before he moved her and those afterward was sufficiently clear that the jury could not reasonably have misunderstood the bases for the two assault charges. Moreover, count nine of the second

amended information specifically alleged defendant's slapping B.S. in the face constituted the second assault.

Similarly, the People elected to base count 15, charging defendant with assaulting L.W., on the specific allegation that he "punched and slapped victim's face. The prosecutor referred to this election in closing argument when he stated, "[L.W.] was forcibly moved 146 feet from an open area to a more secluded area *And from there, he had struck her, the sexual assault.*" (Italics added.) The only evidence in support of the allegation that defendant punched and slapped L.W. in the face was her testimony that defendant, after he dragged her down the block and learned she had no money, hit her "many, many times" in her face, with both a fist and an open hand, despite her pleas that he stop. Defendant's contention that a unanimity instruction was necessary because L.W. also indicated that he struck her at other times during his sexual offenses is unpersuasive in light of the People's specific allegation, the prosecutor's closing argument and the evidence.

Defendant argues that a Supreme Court case cited by the People, *Greer, supra*, 30 Cal.2d 589, demonstrates that the jury may not have convicted him of the assaults against B.S. and L.W. because they were based on acts that were not separate from those involved in his consummated sexual offenses. We disagree. Greer was charged with both statutory rape and committing a lewd act with a minor based on "a single act of intercourse" upon his stepdaughter. (*Id.* at pp. 591–592.) The court concluded as a matter of law that both counts were based on the same act in that, "[e]xcept for the rape itself, the only act which [the victim] accused defendant was the forcible removal of her underclothing immediately preceding the rape. To hold that the removal of the [victim's] underclothing constitutes an act separate from the rape, however, would be artificial in the present context" (*Id.* at p. 604.)

The facts of *Greer* are distinguishable from those here. The *Greer* court concluded that the removal of the victim's clothing was integral to the act of intercourse and could not be separated from it. There also were no other acts involved. Here, on the other hand, none of the acts involved in the assaults that we have described were as a

matter of law integral to the other sexual offenses, and defendant engaged in multiple instances of additional force in the course of committing these other offenses. *Greer* bears no similarity to this case.

Defendant notes correctly that there was evidence that he assaulted S.D. multiple times in the course of his attack on her. He argues that the prosecution did not make any election regarding these acts by quoting selectively from the prosecutor's closing argument. He overlooks the prosecutor's statement, in referring to S.D.'s testimony that she became aware of defendant's pressing his penis against her leg after she awoke, that "[o]bviously, there we have an assault because there is an offensive touching to [S.D.] while she's on the ground." His argument is without merit in light of the prosecution's election. No unanimity instruction was required.

IV.

Denial of Defendant's Section 995 Motion to Dismiss Regarding Counts Nine and 24

Next, defendant argues that the trial court improperly denied his section 995 motion to dismiss regarding counts nine and 24, which were recharged by the prosecution pursuant to section 739 after being discharged by the magistrate. We agree that the trial court erred by denying defendant's motion regarding these counts but conclude the error was harmless.

A. Our Standard of Review

In reviewing a section 995 motion, we disregard the court's ruling and directly review the determination of the magistrate. We do "not substitute our judgment for that of the magistrate as to the credibility or weight of the evidence." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 654.) Whether our review is for substantial evidence or de novo "depends on whether the magistrate has exercised his power to render findings of fact. If he has made findings, those findings are conclusive if supported by substantial evidence. [Citations.] . . . A dismissal unsupported by findings . . . receives the independent scrutiny appropriate for review of questions of law." (*People v. Slaughter* (1984) 35 Cal.3d 629, 638.)

A defendant must show not only that denial of the [section 995] motion was erroneous, but also prejudicial. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 140.) This is because a section 995 motion “cannot be considered as raising a challenge to the trial court’s fundamental jurisdiction over the case.” (*Ibid.*, citing *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 990–991 [“Errors in the denial of a section 995 motion claiming insufficiency of the evidence are not jurisdictional in the fundamental sense”].) Thus, “an erroneous denial of a section 995 motion justifies reversal of a judgment of conviction only when a defendant is able to demonstrate prejudice at trial flowing from the purportedly inadequate showing at the preliminary hearing.” (*People v. Crittenden* (1994) 9 Cal.4th 83, 136–137.)²

B. Defendant’s Section 995 Motion to Dismiss the Aggravated Kidnapping Charge Regarding S.D. (Count 24)

Defendant argues the trial court should have granted his section 995 motion to dismiss the count alleging that he kidnapped S.D. to commit assault against her (count 24) because the magistrate’s finding of insufficient evidence to support the count was supported by substantial evidence. The People contend the magistrate made no such factual finding and, therefore, we need only determine whether there is any factual basis at all for the recharged count, and that in any event the magistrate’s discharge of the count was not supported by substantial evidence. We agree with defendant that the magistrate made a factual finding and conclude that the trial court erred in denying defendant’s section 995 motion because the magistrate’s ruling was supported by substantial evidence, but conclude the court’s error was harmless.

² In his supplemental brief, defendant makes a convoluted argument that prejudice does not have to be shown based on a creative interpretation of *Jones v. Superior Court* (1971) 4 Cal.3d 660 and *People v. Slaughter, supra*, 35 Cal.3d 629, which preceded *People v. Crittenden* and the cases that followed it, such as *People v. Letner and Tobin*. We are obliged to follow the unqualified, clear mandate in the latter cases that prejudice must be found from the erroneous denial of a section 995 motion under circumstances applicable to this case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

1. The Proceedings Below

At the preliminary hearing, the prosecutor introduced evidence that defendant grabbed S.D. at the intersection of 24th Street and Fair Oaks in San Francisco in the early morning darkness, forced her across the street and down Fair Oaks and choked her, causing her to pass out. When she awoke, she found herself on the ground facing south on Fair Oaks, about 141 feet from the intersection, her pants pulled down to mid-thigh and her private area being touched. The man assaulted her, grabbed her things and walked away.

A San Francisco police officer testified that he looked down Fair Oaks from the intersection and observed that Fair Oaks was “a lot darker,” there were “a lot more trees,” and that the corner of 24th and Fair Oaks was more illuminated. Also, 24th Street was a “main thoroughfare,” while Fair Oaks was “a residential area which is less traveled.” A police inspector testified that 24th Street was a “major thoroughfare” for bus lines and vehicles, while Fair Oaks was “a relatively quiet area with a lot of trees that are mature and have large crowns on them.” Photographic exhibits introduced at the hearing included street level and aerial photographs of the area around the intersection of 24th and Fair Oaks.

After the presentation of evidence, the magistrate said he was “struggling” with the kidnapping charge “because you’re just taking someone from one corner to down the street, and I’m sort of vacillating on that to be quite honest. Even though I know there’s testimony that Fair Oaks is less heavily traveled than 24th Street” The prosecutor argued increased risk of harm to S.D. on Fair Oaks because it was “a dark street that is covered by trees as opposed to the intersection which inevitably there probably would be some cars passing by.”

The magistrate said he understood the prosecutor’s argument, but disagreed. He thought that Fair Oaks was “much more open” compared to the sidewalk where another of defendant’s victims, L.W., was attacked. Defendant’s action towards S.D. was, “[b]asically . . . a movement down the block.” He discharged count 24 for insufficient evidence of a kidnapping.

The People subsequently charged defendant again with aggravated kidnapping. Defendant moved to dismiss this charge pursuant to section 995 on the ground that, as indicated by the magistrate's finding, his movement of S.D. did not substantially increase the risk of harm to S.D. The trial court denied his motion.

2. Analysis

“ ‘Kidnapping to commit rape involves two prongs. First, the defendant must move the victim and this asportation must not be “merely incidental to the [rape].” [Citation.]’ [Citation.] ‘Second, the movement must increase “the risk of harm to the victim over and above that necessarily present in the [rape].” ’ ’ ” (*People v. Aguilar* (2004) 120 Cal.App.4th 1044,1048 (*Aguilar*).)

We agree with defendant that the magistrate made a factual finding in support of his decision to discharge count 24. At the preliminary hearing, the prosecutor, after exploring the facts in some detail, stated that defendant moved S.D. to a “more discrete, less detectable” location, thereby increasing the risk of harm to her; “[o]therwise [he] could have sexually assaulted . . . S.D. right at the intersection where he encountered her right on 24th Street.” The magistrate replied, “I think I understand the argument. I don’t agree.” The magistrate then compared Fair Oaks with the relatively narrow sidewalk where another victim, L.W. was assaulted, on which were “overgrown weeds” and “heavy trees.” He concluded that defendant’s movement of S.D. was “[b]asically . . . movement down the block” and, referring to a street-level photograph of a portion of the Fair Oaks block, on a sidewalk that was “more open, not as heavily forested as the place [where L.W. was attacked].” By this exchange it is clear that the court found defendant did *not* move S.D. to a more discrete and less detectable location and, therefore, that the “increased risk of harm” prong of kidnapping to commit rape was not met.

Substantial evidence supports the magistrate’s factual finding. Exhibit 27, a photograph of the Fair Oaks sidewalk relied on by the magistrate, appears taken from a few buildings down from the intersection at 24th Street during the day (all of the photographic exhibits appear taken during the day). It shows a fairly wide open sidewalk that, although bordered by some trees, contains ample empty space between the trees and

several residential buildings, which are flush up against the sidewalk. The trees are not particularly imposing, but their partially visible crowns appear to be full. Significant parts of the sidewalk appear shaded, but it is not clear that this is caused by trees or buildings or both; sunlight can be seen on the sidewalk at some parts.

Another photograph, exhibit 28, is an aerial view of the area around Fair Oaks and 24th Street. It indicates the sidewalk on the relevant block of Fair Oaks was fairly broad and that trees were not lined up one after the other down the block, leaving multiple opportunities for light to reach the sidewalk unfiltered by the trees that were there.

Further, there was evidence that it was dark outside and that the sun had not started to rise when the attack occurred. It is reasonable to infer from the general darkness of this hour that the difference in light between the intersection and the middle of the Fair Oaks block was minimal.

From this evidence the magistrate could reasonably infer that the chance of defendant being seen attacking S.D. on Fair Oaks was equivalent to the chance of him being seen doing so at the intersection. The trial court should have granted defendant's motion to dismiss count 24.

Nonetheless, the trial court's error was not prejudicial because there also was sufficient evidence introduced at trial—which evidence was more than that presented at the preliminary hearing—to support the jury's finding that defendant *did* engage in an aggravated kidnapping. As we have discussed, “an erroneous denial . . . justifies reversal of a judgment of conviction only when a defendant is able to demonstrate prejudice at trial flowing from the purportedly inadequate evidentiary showing at the preliminary hearing.” (*People v. Crittenden, supra*, 9 Cal.4th at p. 137.) S.D. testified that Fair Oaks seemed darker than the intersection, was a smaller side street and lots of trees on it blocked the light. She saw no foot or car traffic there. A San Francisco police officer also testified at trial that, while 24th Street was a heavily used thoroughfare with public transportation coming through, Fair Oaks had “very, very light” foot and car traffic; moreover, it was “way darker” in the middle of the Fair Oaks block where S.D. was taken than at the intersection. A San Francisco police inspector testified that it became darker

as one traveled down Fair Oaks from 24th Street. This was sufficient evidence for the jury to conclude that defendant's movement of S.D. did substantially increase her risk of harm. (See, e.g., *Aguilar, supra*, 120 Cal.App.4th at pp. 1049–1050 [substantial increase of risk of harm occurred when defendant moved victim 133 feet down a sidewalk to an extremely dark area on the sidewalk].)

We also reject defendant's argument that this movement was incidental to his later assault of S.D.; it is obvious that a reasonable juror could have concluded that he could have engaged in his assault at the intersection. (See *Aguilar, supra*, 120 Cal.App.4th at pp. 1050–1052 [whether the movement was incidental to the sexual offense depends on the context of the particular case].)

In short, defendant was not prejudiced by the trial court's erroneous denial of his section 995 motion regarding count 24.³

C. Defendant's Section 995 Motion Regarding Defendant's Assault of B.S. (Count Nine)

Defendant also argues the trial court should have granted his section 995 motion to dismiss count nine as recharged by the prosecutor. We again agree, but conclude the trial court's error was not prejudicial. The prosecution introduced evidence at the preliminary hearing that defendant had, among other things, put his hands around her throat and forced her to orally copulate his penis with her mouth a second time. She choked or gagged. He told her to shut up and slapped the left side of her face. He then "flipped her over and inserted his finger into her anus."

The prosecutor argued that the evidence that defendant slapped B.S. on the side of her face in frustration was a sufficient ground for a separate assault charge. The magistrate responded, "I didn't get the sense that that was a transaction that was in any way not part of this continuing course of conduct." The prosecutor stated that, while it could be argued that all of the assaults were part of a continuous course of conduct, they

³ For this same reason, we reject defendant's similar argument that the evidence presented at trial was insufficient to support defendant's conviction for count 24.

nonetheless could be charged as separate crimes. The court did not agree. It discharged count nine for insufficient evidence.

Defendant argues that the trial court should have granted his subsequent motion to dismiss count nine because the magistrate's ruling was supported by substantial evidence that defendant's slap of B.S.'s face was a part of a continuous course of conduct. The People argue the magistrate made a legal error because section 954 expressly provides that a defendant may be convicted of more than one crime arising out of the same act or course of conduct. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

The People's claim of legal error is unpersuasive. As we have discussed, section 954 allows multiple convictions for the same act, but *not* if one offense is a *necessarily* lesser included offense of the other. (*People v. Montoya, supra*, 33 Cal.4th at p. 1034.) The People do not contest that count nine alleged an offense that was a lesser included offense of any one of the counts alleging defendant engaged in forcible oral copulation and forcible sexual penetration with a foreign object *if* based on the same act. The magistrate's finding essentially was that defendant's slap was not distinguishable from the acts around it. Substantial evidence supports this finding, given that defendant slapped B.S. in reaction to her choking as he forced her to orally copulate him. This sufficiently supported the magistrate's "continuous course of conduct" finding.

Nonetheless, the trial court's erroneous denial of defendant's section 995 motion to dismiss count nine was not prejudicial because there *also* was sufficient evidence introduced at trial—evidence that was different from that presented at the preliminary hearing (B.S. testified only at trial, for example)—to support the jury's finding that defendant's slapping B.S. in the face in between his forcible acts of oral copulation and digital penetration constituted a separate assault. In other words, substantial evidence supported the magistrate's ruling, but the evidence presented at trial supported the jury's verdict.

Specifically, the trial evidence indicated that the slap was not necessarily integral to defendant's commission of either of the sexual offenses that preceded and followed the slap. Although B.S.'s testimony was that defendant slapped her when she gagged in the

midst of his forcing her to orally copulate him, this was not the only force he used during that sex offense. B.S. also testified that he choked her, then forced her mouth on his penis and pushed her head back and forth for a minute or more. After defendant slapped her, he did not force her to further orally copulate him. Further, the jury could conclude this slap was not an integral part of his forced digital penetration, as the latter occurred after he ordered her to turn around and get on her hands and knees and he forcibly put his finger into her anus. Instead, the jury could have reasonably concluded that defendant slapped B.S. in order to continue his sexual assault of her, without having a particular sexual offense in mind when he did so. Therefore, we conclude defendant was not prejudiced by the court's erroneous denial of his section 995 motion regarding count nine.

V.

The Aggravated Kidnapping Allegations Regarding L.W.

Defendant argues the jury's finding true the aggravated kidnapping allegations attached to counts 16 through 21, which charged defendant with committing several consummated sexual offenses against L.W., was not supported by sufficient evidence.⁴ We disagree.

In counts 16 through 21, the prosecution alleged that defendant kidnapped L.W. in the course of either committing forcible oral copulation (counts 16 and 19) or sexually penetrating her with a foreign object by force and violence (counts 17, 18, 20 and 21) and in doing so "substantially increased" the risk of harm to her beyond the level inherent in the underlying offense. By the so-called "One Strike" law, each of these aggravated circumstance allegations exposed defendant to a mandatory 25 years to life sentence if he were found guilty of the sexual offense charged. (§ 667.61, subds. (a), (c), (d)(2); see *People v. Alvarado* (2001) 87 Cal.App.4th 178, 186.)

⁴ The heading of defendant's argument lists counts brought regarding his attack on B.S., but he actually challenges the counts brought regarding his attack on L.W.

As we have discussed, evidence was presented at trial that defendant moved L.W. before committing his sexual offenses against her. That is, in the early morning, while it was still dark outside, defendant grabbed L.W. from behind at a somewhat illuminated bus shelter on Potrero Avenue and dragged her about half a block, a distance of approximately 146 feet, to beneath a tree, by a car that blocked views of the location from the street. This location was darker than the bus shelter area. Defendant pushed L.W. to the ground and subsequently committed sexual offenses against her. The jury found him guilty of six counts of consummated sexual offenses against L.W. and found true the aggravated kidnapping allegations made pursuant to section 667.61, subdivision (d)(2). The court subsequently sentenced defendant to 25 years to life for each of the six counts.

We review the jury's findings for substantial evidence, meaning evidence that is "reasonable, credible and of solid value." (*People v. Rodriguez, supra*, 20 Cal.4th at p. 11.) In this context, " 'we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' " (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

As we have also discussed, generally kidnapping to commit a sexual offense involves two prongs. First, the defendant must move the victim, and this asportation must not be merely incidental to the sexual offense. Second, the movement must increase the risk of harm to the victim over and above that necessarily present in the sexual offense. (See *Aguilar, supra*, 120 Cal.App.4th at p. 1048 [regarding rape].) In the case of the "One Strike" law, the increase in risk of harm also must be "substantial." (§ 667.61, subd. (d)(2).)

The parties do not define the word "substantial." In our own research we have not found a definition for the term as used in section 667.61, subdivision (d)(2). The California Supreme Court has determined "in the context of our simple kidnapping statute [section 207], where the adjective " 'substantial' modifies the noun 'distance,' the word "substantial' means a 'significant amount' as contrasted with a distance that is 'trivial.' " (*People v. Morgan* (2007) 42 Cal.4th 593, 606–607.) Applying this definition

here, we must determine whether substantial evidence indicates defendant's movement of L.W. was beyond that incidental to his sexual offenses and increased the risk of harm to her by a significant amount.

We conclude that substantial evidence so indicates. Defendant does not contend that his movement of L.W. was merely incidental to his sexual offenses and it appears to have gone well beyond such movement. As for whether his movement of L.W. substantially increased the risk of harm to her, the bus shelter where defendant grabbed L.W. was somewhat illuminated. Further, L.W. was there to wait for a bus; in other words, there was a significant risk that defendant would be discovered if he sexually assaulted L.W. at the shelter because a bus could come by whose driver likely would look around the shelter for people waiting for the bus, if not stop there to allow passengers to exit there. As a result, defendant's removal of L.W. from the bus stop to a location half a block away, which also was darker and obscured from the street by a tree and parked cars, substantially increased the risk of harm to L.W. because the chances defendant would be detected assaulting her were much less than if they had stayed at the bus shelter.

Defendant contends his movement of L.W. did not substantially increase the risk of harm to her because he did not remove her from the public sidewalk, Potrero Avenue was a "major traffic artery" and the bus shelter provided as much, if not more, concealment than the tree and parked cars. These contentions in effect ask that we reweigh the evidence. We will not do so when reviewing the record for substantial evidence. (See, e.g., *People v. Little* (2004) 115 Cal.App.4th 766, 771 ["we do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses"].) Defendant's argument lacks merit.

VI.

The Trial Court's Jury Instructions About the Aggravated Kidnapping Sentencing Allegations

Defendant next argues that the court erred when it instructed the jury about the aggravated kidnapping sentencing allegations regarding B.S. and L.W. (attached to

counts 3, 4, 6, 7, 8, 11, 12, 16, 17, 18, 19, 20 and 21). The court modified the standard instruction to include examples of what could be considered in determining whether there was substantial movement of B.S. and L.W. According to defendant, the resulting instruction shifted the burden of proof, diluted the reasonable doubt standard, and constituted an improper comment on the evidence in deprivation of his right to a fair trial and jury determination of his guilt of innocence.

At trial, the court instructed the jury pursuant to CALCRIM 3175, as modified by the court based on language requested by the prosecutor for another instruction. The court's instruction was as follows, with the language challenged by defendant in bold:

*“Substantial distance means more than a slight or trivial distance. The movement must be more than merely incidental to the commission of the rape, sodomy, oral copulation and sexual penetration. In deciding whether the distance was substantial and whether the movement substantially increased the risk of harm, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the distance the other person was moved was beyond that merely incidental to the commission of a charged crime, **whether the movement increased the risk of physical or psychological harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.***

“The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.”

We conduct a de novo review of instructional error claims. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) “Even if the [trial] court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly.” (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) “ ‘ “In reviewing [a] purportedly erroneous instruction[], ‘we inquire “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution.’ ” ’ ”

(*People v. Castaneda* (2011) 51 Cal.4th 1292, 1320.) We judge the instruction in the context of the overall charge and “ ‘ “assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” ’ ” (*Id.* at p. 1321.) Again, error is not presumed; rather, appellant has the burden of establishing prejudicial error. (*Lynch, supra*, 44 Cal.2d 839, 846.)

Defendant contends the trial court erred by adding language that “presented the jury with all the factors which might tend in reason to indicate that the asportation was, in fact, of a substantial distance. However, the add[ed] language failed to include the factors tending in reason to indicate a *lack* of substantial distance. The instruction given was thus decidedly one-sided in its presentation of factors to be considered in evaluating substantial distance.”⁵

Defendant does not cite any legal authority in support of his contention that the trial court erred in giving this instruction. Therefore, he has not met his burden of showing error. (*Lynch, supra*, 44 Cal.2d at p. 846.)

We also conclude there is not a reasonable likelihood that the jury would have interpreted the challenged instruction improperly. Defendant does not contend that the instruction was erroneous in its statement of the law, nor does he suggest what the court should have instructed to indicate what would be an insufficient distance. Further, the jury was instructed that the People had the “burden of proving each allegation beyond a reasonable doubt” and that “[i]f the People have not met this burden, you must find that the allegation has not been proved.”

For each and all of these reasons, defendant’s argument is unpersuasive.

⁵ Defendant points out that the court also included its added language in its instructions for kidnapping for sexual offense under section 209, subdivision (b)(1). However, he challenges only the court’s instruction regarding the aggravated kidnapping sentencing allegations. Therefore, we do not address this other instruction further.

VII.

The Trial Court's Response to the Jury's Question About Robbery

Defendant next argues that the trial court failed to adequately instruct the jury in response to a jury question about the commencement and duration of robbery. Again we disagree.

During jury deliberations, the jury asked the court: “For the allegation of great bodily harm, [d]oes the commission of robbery only begin at the moment the property was taken (all other elements satisfied) OR is the robbery considered to have started from the moment of the attack?”

The court, with the approval of the prosecution and defense counsel, responded: “Robbery can be a continuous offense, assuming all of the elements are satisfied. It is up to you to decide when the robbery began.”

There are two problems with defendant's argument. First, the jury later found that the great bodily injury allegation that was the subject of its question was not true, rendering any error about the jury's robbery instruction harmless. Second, defendant does not contend the trial court incorrectly stated the law in its response.

These seemingly fatal problems do not prevent defendant from raising an appellate claim, however. He argues that the jury's question put the trial court on notice that the jury “needed clarification of the issue of after-formed intent,” which the court was required to provide pursuant to its mandatory duty to clarify issues about which the jury expresses confusion. (See, e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) Moreover, defendant contends that the trial court should have provided this clarification for *all* of the sentencing clauses, particularly those alleging aggravated kidnapping. He claims that the jury, if it had received this clarification, “may not have held [defendant] responsible for the kidnapping counts and clauses” based on what he told police about his actions.

Defendant's argument is convoluted, to say the least. He points out correctly that the trial court was required to instruct the jury on general principles of law governing the

case, which are those principles “closely and openly” connected to the facts and necessary for the jury’s understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) However, we do not agree that the jury’s question showed it was confused about “after-formed intent” regarding the aggravated kidnapping sentencing allegations or anything else. The jury’s question did not ask the court anything about the formation of intent. Also, defendant does not cite any legal authority requiring a court to reach beyond the question asked and speculate about what further confusion the jury might be experiencing. Therefore, he has again not met his burden of showing error. (*Lynch, supra*, 44 Cal.2d at p. 846.) In any event, his argument would have required the trial court to have been clairvoyant. The trial court properly answered the jury’s question about the continuous nature of robbery. Defendant does not establish that anything more was required.

In light of our conclusion, we do not address the People’s argument that defendant waived his appellate claim by participating in formulating, and approving, the court’s answer to the jury’s question.

VIII.

The Punishments Imposed for Defendant’s Assault and Attempted Rape Convictions

Defendant also argues that, pursuant to section 654, he could not be separately punished for his assaults of B.S. and L.W. (counts two, nine and 15), nor for the attempted rapes of B.S. (counts five and 10), because they were part of an indivisible course of criminal conduct that also resulted in his being punished for his consummated sexual offenses against B.S. and L.W. He asks that we stay these improperly imposed sentences. We decline to do so except for count nine.

Defendant also argues that he could not be separately punished for count 25, his assault of S.D., because his actions in assaulting her cannot be separated from the actions underlying his conviction for count 24, his aggravated kidnapping of S.D. We disagree with this as well.

A. The Sentencing Proceedings

The trial court ordered that defendant serve full and consecutive indeterminate term sentences of 25 years to life for each of his consummated sexual offenses against B.S. and L.W. and consecutive one-year terms for his attempted rapes of B.S. (counts five and 10).

The trial court did not make express findings regarding section 654. However, it stated, “The offenses alleged in Counts 3, 4, 6, 7, 8, 10, 11, 12, 16, 17, 18, 19, 20, and 21 occurred on separate occasions in that the defendant had a reasonable opportunity to reflect on his actions, and nevertheless, he resumed his depraved sexual assault on each of these victims.” Regarding the offenses against B.S., the court stated that “the evidence indicates that she was sexually assaulted for over 30 minutes. She was told to orally copulate [defendant], and when she wasn’t cooperative with his demands, he slapped her, turned her around, pulled her hair, changed her position. She had cuts on her hands and her knees. And in his own words during the interview with Inspector Nannery, he knew it wasn’t right, but he continued to do it.”

Regarding the offense against L.W., the court stated that defendant engaged in “similar conduct that he had for reflection and a reasonable opportunity to reflect on his actions, and yet he continued to assault her. . . . [H]e choked her, he told her not to look at him. When she refused his demands he choked her some more. He slammed her. [¶] He choked her so badly that all the capillaries in her eyes were burst, burst to blood red. So he certainly had ample opportunity to reflect”

The court further stated, “Similarly, as to both of the victims, he had an ample opportunity to reflect, so I’m running each of those counts consecutive to each other.”

Regarding S.D., the court stated, “[defendant] came from behind [S.D.], choked her. She fainted. When she came to, she testified that she thought she was dreaming, thought it was a nightmare. Her face was bloodied. Her nose was split so badly that you could see the cartilage in between, and the defendant at one point during [S.D.’s] testimony and her very brave testimony, she testified that he came within inches of her face, and in her own words she said it was then I thought I was going to die.”

The court then noted that all of the offenses involved sophistication and planning, that the women were targeted, and that defendant followed them to areas where they were the most vulnerable, pounced on them and dragged them to a more secluded area to commit his heinous acts. It concluded, “These crimes collectively and individually were horribly violent and present a serious danger to the community if [defendant] was ever released. So the defendant will first serve the determinate sentence, to be followed by the indeterminate sentence, with each count in this case running consecutive to one another.”

B. Relevant Law

Section 654, subdivision (a) states: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

“Section 654 therefore ‘precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. ‘Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.’ [Citations.] ‘[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.’ [Citation.]” [Citation.]’ [Citations.] However, if the defendant harbored ‘multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]’ [Citations.]

“Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court’s determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Typically, if section 654 does apply, we stay the sentence for the appropriate count. (See, e.g., *People v. Gardner* (2014) 231 Cal.App.4th 945, 960.)

C. Analysis

1. Defendant's Punishment for His Assaults of B.S. and L.W.

Regarding his convictions for assaults of B.S. (counts two and nine) and L.W. (count 15), defendant relies primarily on his arguments and contentions that we have rejected in Discussion parts I, II and III, *ante*. His only other point is that the People's sentencing memorandum did not attempt to distinguish defendant's assaults from certain other offenses. This has no significance to our analysis.

However, while we have concluded that defendant could be convicted separately for an assault against B.S. as alleged in count nine—his slapping her in her face—we conclude the court erred by imposing a punishment for this count (a six-year sentence) separate from that imposed for his forcible oral copulation that preceded it.⁶ The court's basis for imposing consecutive sentences for defendant's assaults and sexual offenses against B.S. was that defendant had "numerous opportunities to reflect" between these acts. There is no evidence defendant had this opportunity between his forcible oral copulation of B.S. and his slapping her in the face. To the contrary, B.S. testified that it appeared he slapped her because she gagged during this forcible oral copulation. Indeed, the court does not appear to have actually found he had an ample opportunity to reflect before slapping B.S. While it imposed a six-year consecutive sentence for count nine, it did *not* include count nine in the long list of offenses it recited at the sentencing hearing for which defendant had this "ample opportunity." Accordingly, we order the trial court's imposition of a separate sentence for count nine be stayed.

Regarding his convictions for his attempted rapes of B.S. (counts five and 10), he refers to his argument that these offenses should have been merged with his assault

⁶ In closing argument, the prosecution did not identify the specific count that represented this forcible oral copulation, but instead referred to four instances of forcible oral copulation, for which defendant received the identical punishment of 25 years to life sentences.

convictions, which we have rejected in Discussion part II, *ante*, and further contends that for punishment purposes they are not separable from his consummated offenses.⁷

Defendant further asserts that attempted rape and an assault resulting in consummation of at least one sexual offense do not represent independently punishable acts, relying on *People v. Delgado* (1973) 32 Cal.App.3d 242, disapproved on other grounds in *People v. Rist* (1976) 16 Cal.3d 211, 222, fn. 10. In *Delgado*, the court determined that the facts indicated the defendant had one objective and intent in assaulting the victim with the intent to commit rape, assaulting her by means likely to produce great bodily injury, and attempting to rape her—that being to commit forcible rape. (*Id.* at p. 255.)

Delgado, however, does not indicate that a trial court cannot determine, as the trial court did here, that the facts indicated a defendant had the opportunity to reflect on his actions before deciding to continue with a separate criminal act. As the People point out, our Supreme Court has held that a defendant can be sentenced to separate sentences for multiple assaults in a single incident based on separate intents to obtain sexual gratification for each sexual act. (*People v. Harrison* (1989) 48 Cal.3d 321 (*Harrison*).) The *Harrison* court stated, “It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.” (*Id.* at p. 335.) If a “defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ ” (*Id.* at p. 335.) The *Harrison* court recounted approvingly its prior decision in *People v. Perez* (1979) 23 Cal.3d 545 (*Perez*):

“In [*Perez*], we held that section 654 did not preclude punishment for each sex crime (rape, sodomy, and 2 oral copulation counts) committed during a continuous 45-to-60-minute attack. Defendant argued that his offenses were part of an indivisible

⁷ Defendant asserts that he has included in the argument we have rejected in Discussion part II, *ante*, that the attempted rape offenses also should have been merged with the consummated sexual offenses. He has not.

transaction, because they furthered his ‘single intent and objective of obtaining sexual gratification.’ [Citation.] We observed, however, that such a ‘broad and amorphous’ view of the single ‘intent’ or ‘objective’ needed to trigger the statute would impermissibly ‘reward the defendant who has the greater criminal ambition with a lesser punishment.’ [Citation.] Rather, in keeping with the statute’s purpose, the proper view was to recognize that a ‘defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.’ [Citation.] Accordingly, we declined ‘to extend the single intent and objective test of section 654’ Since ‘[none] of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental’ to any other, section 654 did not apply.” (*Harrison, supra*, 48 Cal.3d at pp. 335–336.)

The trial court’s factual finding here that defendant had the opportunity to reflect between his numerous offenses but chose nonetheless to continue to the next one indicates it too concluded that none of the offenses it recited was committed as a means of committing any other, none facilitated the commission of any other, and none was incidental of any other. Substantial evidence supports this conclusion in the form of B.S. and L.W.’s testimony, which supports the trial court’s determination that defendant had the opportunity to reflect on his actions after the commission of each sexual offense, but decided to continue to sexually violate them. We discussed much of our views regarding this evidence in rejecting defendant’s arguments in Discussion parts I, II and III, *ante*. We are not aware, and defendant does not cite, anything B.S. or L.W. said that linked defendant’s objectives and intents in committing these assaults and attempted rapes to any of the other sexual offenses. Defendant’s argument, therefore, is without merit.

2. Defendant’s Punishment for His Assault of S.D.

Defendant also argues that he should not have been separately punished for his assault of S.D. (count 25) because he entertained the same intent and objective during this assault and his aggravated kidnapping of S.D. (count 24), which preceded it. We disagree.

As we have discussed, if the evidence indicated that defendant harbored the same intent and objective for both his aggravated kidnapping and assault of S.D., the sentence for the lesser-punished offense, in this case the assault, would have to be stayed. However, we conclude the trial court did not abuse its discretion in impliedly concluding that these two crimes were not based on the same intent and objective. The court could reasonably infer from S.D.'s testimony that when defendant formed the intent and objective of kidnapping S.D. and taking her to a more secluded location, he did not harbor the intent and objective of sexually assaulting her in the manner that he later did. This is because S.D.'s testimony indicates that in the course of his grabbing her at the intersection of 24th Street and Fair Oaks and dragging her down Fair Oaks, S.D. began to scream so loudly that defendant choked her into unconsciousness. The court could reasonably conclude this was an unanticipated event, that defendant had the opportunity to reflect on his conduct at the time and changed his intent and objective, and that this change of intent and objective ultimately led to the assault he committed. Therefore, the court did not abuse its discretion in imposing consecutive sentences on defendant for his aggravated kidnapping and assault convictions regarding S.D.

IX.

The Court's Order That Defendant Pay Restitution

Finally, defendant argues that the \$10,000 restitution fines that the court ordered defendant pay as a part of several of his convictions should be stricken because they are duplicate punishments. We disagree this was the case regarding his convictions for the aggravated kidnappings of B.S. and L.W. or most of the other counts that defendant contends involved duplicative convictions or punishment, which arguments we have already rejected. However, we agree that the restitution ordered regarding count nine was a duplicate punishment that must be stricken.

The trial court stayed defendant's sentences for the aggravated kidnappings of B.S. and L.W. Defendant's convictions were governed by section 209, subdivision (b) (1), which states that "[a]ny person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, [or] sodomy . . . shall

be punished by imprisonment in the state prison for life with the possibility of parole.” As the trial court indicated, section 209, subdivision (d) prohibits a person from being punished for aggravated kidnapping pursuant to section 209 when the person is also punished for same act pursuant to section 667.61.⁸ As we have already discussed, the jury found true numerous aggravated kidnapping allegations alleged pursuant to section 667.61, which were attached to the consummated sexual offense counts for which defendant was convicted. These findings caused the trial court to sentence defendant to 25 years to life sentences for these offenses.

Nonetheless, pursuant to section 1202.4, subdivision (b)(1), the trial court imposed the maximum restitution fine allowed of \$10,000 for each of the 25 counts for which defendant was convicted, for a total amount of \$250,000. Section 1202.4, subdivision (b)(1) states that “[i]n every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine” subject to exceptions not argued to apply here, which fine is to be set at the discretion of the court and commensurate with the seriousness of the offense, up to \$10,000. The court found defendant’s crimes were “so heinous and barbaric” as to justify the maximum fine.

Thus, the court fined defendant \$10,000 for each of his aggravated kidnappings of B.S. and L.W., although it stayed his sentences for these crimes pursuant to section 209, subdivision (d). Defendant argues on appeal that these two fines were improper duplicate punishments as well and must be stricken pursuant to *People v. Le* (2006) 136 Cal.App.4th 925 (*Le*) because they were fines imposed upon stayed counts. This is incorrect.

In *Le*, the defendant was convicted of a robbery and burglary arising out of the same indivisible course of conduct, the stealing of goods from a drugstore. (*Le, supra*, 136 Cal.App.4th at pp. 930–931.) The appellate court determined that the trial court had

⁸ Section 209, subdivision (d) states in relevant part: “A person may be charged with a violation of subdivision (b) and Section 667.61. However, a person may not be punished under subdivision (b) and Section 667.61 for the same act that constitutes a violation of both subdivision (b) and Section 667.61.”

improperly sentenced the defendant to consecutive prison terms for both convictions in violation of section 654. (*Id.* at pp. 931–932.) Section 654 provided (and still provides) in pertinent part that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§654, subd. (a); *Le, supra*, at p. 931.) The appellate court held that the trial court should have stayed the sentence for the burglary conviction pursuant to section 654 for the same indivisible course of conduct. (*Le, supra*, at p. 932.)

The *Le* court also addressed whether the trial court violated section 654’s ban on multiple punishments by ordering a restitution fine pursuant to section 1202.4 that was based in part on the defendant’s burglary conviction. The appellate court reasoned that a restitution fine was a “punishment” and “criminal penalty” and, thus subject to section 654. (*Le, supra*, 136 Cal.App.4th at p. 933.) It also noted that our Supreme Court has established the general rule that section 654 “ ‘prohibits the use of a conviction for any punitive purpose if the sentence on that conviction is stayed.’ ” (*Ibid.*, quoting *People v. Pearson* (1986) 42 Cal.3d 351, 361.) The *Le* court noted that the Legislature could create an exception to the section 654 ban on multiple punishments for restitution fines, including without expressly referring to section 654, but the court concluded that section 1202.4, subdivision (b)(2) did not contain such language. (*Le, supra*, at pp. 933–934.) It concluded, therefore, that section 654’s ban on multiple punishments was violated when the court considered a felony conviction for which the sentence was stayed pursuant to section 654 in calculating its restitution fine pursuant to section 1202.4, subdivision (b)(2). (*Id.* at p. 934.)

Le is only indirectly relevant here. As the People point out, defendant’s aggravated kidnapping convictions were not stayed pursuant to section 654, but pursuant to section 209, subdivision (d).

In interpreting statutory language, “ ‘[w]e begin with the fundamental rule that our primary task is to determine the lawmakers’ intent.’ [Citation.] The process of

interpreting the statute to ascertain that intent may involve up to three steps. . . . ‘[W]e first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction.’ ” (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.)

We have analyzed section 209, subdivision (d), section 667.61 and section 1202.4, to determine whether the restitution fines in this case are improper. We conclude the Legislature excepted restitution fines from any ban contained in these statutes based on the plain language of the statutes themselves. The parties neglect to discuss that section 667.61 expressly states that, in the event that a 25 years to life term is imposed pursuant to section 667.61, subdivision (a) under the minimum number of circumstances specified in section 667.61, subdivision (d), additional punishment can be imposed when that “punishment under another provision of law can be imposed in addition to the punishment provided by this section.” (§ 667.61, subd. (f).)⁹ The restitution fines were imposed pursuant to section 1202.4, subdivision (b). Section 1202.4, subdivision (a)(3) states that “[t]he court, *in addition to any other penalty provided or imposed under the law*, shall order the defendant to pay . . . [¶] (A) [a] restitution fine in accordance with subdivision (b).” (Italics added.) This italicized language qualifies under section 667.61, subdivision (f) as an exception to any ban on additional punishment that might otherwise have been mandated here.

⁹ Section 667.61, subdivision (f) states in full: “If only the minimum number of circumstances specified in subdivision (d) or (e) that are required for the punishment provided in subdivision (a), (b), (j), (l), or (m) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a), (b), (j), (l), or (m) whichever is greater, rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), (j), or (l) and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other provision of law.”

Furthermore, this is not a case in which a defendant was *convicted* of the same act under two different statutes and fined twice; rather, his sentences for aggravated kidnapping were stayed pursuant to statute because his sentence for other offenses, in this case forcible oral copulation and forcible penetration by a foreign object, were expanded pursuant to statute because of this aggravated kidnapping. The court ordered restitution fines for his aggravated kidnapping convictions and his consummated sexual offenses convictions.

Finally, defendant does not contend that the court could not impose the restitution fine in addition to any prison sentence it imposed pursuant to section 209, subdivision (b) for aggravated kidnapping. It is unlikely that the Legislature, by permitting the imposition of a greater prison sentence pursuant to section 667.61—which is after all, a *sentencing* statute that does not provide for the imposition of restitution fines—would have intended to eliminate the restitution fine that can be imposed for a section 209 conviction.

Therefore, we affirm the trial court’s imposition of restitution fines for defendant’s aggravated kidnappings of B.S. and L.W. However, as we have already discussed in Discussion part VIII, *ante*, we agree with defendant that his punishment for count nine was duplicative and his sentence for that count must be stayed. Therefore, the \$10,000 restitution fine he was ordered to pay regarding this count must be stricken. (*Le, supra*, 136 Cal.App.4th at p. 934.)

DISPOSITION

The judgment is modified to show that the sentence on count nine of six years is stayed pursuant to section 654 and the restitution ordered for that count is stricken. The trial court is directed to prepare and forward to the proper authorities an amended abstract of judgment showing these changes. As so modified, the judgment is affirmed.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.